APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 98-56464

D.C. No. CV-98-00036-LGB

JOHN DEERE INSURANCE COMPANY,

an Illinois corporation,

Plaintiff-cross-defendant-Appellee,

v.

GUILLERMO NUEVA, *Defendant-Appellant,*

LOS ANGELES COUNTY METROPOLITAN TRANSPORTATION AUTHORITY,

Defendant-cross-claimant-Appellant,

and

JOO SANG LEE, DEDRIC MANGUM, RASHPAL SINGH, GURMUKH SINGH GARCHA, BLUE STAR TRUCKING, aka Blue Star Transportation, INDERJIT SINGH, SOUTHWESTERN CARRIERS, BALJIT SAHOTA, PROGRESSIVE NORTHWESTERN INSURANCE COMPANY, TARSEM SINGH,

Defendants-Cross-defendants.

OPINION

Appeal from the United States District Court for the Central District of California, Lourdes G. Baird, District Judge, Presiding.

Argued and Submitted

April 4, 2000—Pasadena, California

Filed September 20, 2000

Before: Procter Hug, Jr., Chief Judge, Warren J. Ferguson, Circuit Judge, and Jane A. Restani,[1] Court of International Trade Judge.

Opinion by Chief Judge Hug

COUNSEL

Jacqueline Jordan Leung, Boornazian, Jensen & Garthe, Oakland, California, for the appellants.

Garth Goldberg, Wilson, Kenna & Borys LLP, Los Angeles, California, for the appellee.

OPINION

HUG, Chief Judge:

We are asked to decide whether a federally mandated endorsement to an insurance policy creates a duty on the part of an insurer to indemnify a permissive user of an auto not covered by the underlying policy for injuries he negligently caused to members of the public. The district court found that the endorsement did not modify the policy to require indemnification and granted summary judgment for the insurer. This is an issue of first impression for this circuit. We have jurisdiction pursuant to 28 U.S.C § 1291, and for the following reasons, we reverse the district court judgment.

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[1] The Honorable Jane A. Restani, Judge of the Court of International Trade, sitting by designation.

BACKGROUND

This appeal arises out of an underlying personal injury action entitled *Nueva v. Garcha, et. al.*, Los Angeles County Superior Court Case No. TC 009762 ("underlying action"). The underlying facts, which are not in dispute, are that a tractor/semi-trailer operated by Gurmukh Singh Garcha ("Garcha") and Blue Star transportation ("Blue Star") rear-ended a Los Angeles County Metropolitan Transit Authority ("LACMTA") bus operated by Guillermo Nueva ("Nueva") (collectively "Appellants"). The collision resulted in a total loss to the bus and personal injuries to Nueva.

The tractor/semi-trailer unit was being driven by Garcha. The tractor was owned by Inderjit Singh ("Singh") and Garcha dba Blue Star, who are uninsured and not involved in this appeal. This appeal revolves around the liability associated with the other vehicle, the Great Dane semi-trailer ("trailer"), which was owned by Baljit Singh Sahota dba Sahota Trucking ("Sahota"). Sahota is John Deere's named insured. Prior to the accident, Sahota had agreed to sell the trailer to Blue Star, but the title had not yet transferred because the final payment had not been made. Sahota's policy with John Deere included a federally mandated MCS-90 endorsement, whose scope is the subject of this appeal.

On January 5, 1998, John Deere filed a complaint against several parties, including LACMTA and Nueva, seeking a declaration that John Deere had no duty, pursuant to a policy of insurance it issued to Sahota, to indemnify Sahota, Garcha, and Blue Star, among other parties, with respect to any liability arising out of the underlying action filed by Nueva. On March 20, 1998, LACMTA filed an answer to the complaint and a cross claim for declaratory relief against John Deere. LACMTA asked for a declaration that, with respect to the John Deere policy, Garcha and Blue Star are 'insureds' pursuant to the MCS-90 endorsement to the policy and the

California permissive user statute, thus requiring John Deere to pay judgment against Sahota, Garcha, and Blue Star, subject to a limit of $750,000.

The parties both made motions for summary judgment. On July 6, 1998, the district court issued an order granting John Deere's motion for summary judgment, denying LACMTA and Nueva's motion for summary judgment and dismissing Sahota and Sahota Trucking for lack of prosecution. The district court found that the insurance policy did not cover the operators of the tractor/trailer combination vehicle as "insureds" because the MCS-90 endorsement created merely a "reimbursable obligation" with respect to payments on behalf of its insured, Sahota, but did not create "coverage" for Garcha and Blue Star, who it classified as users of non-scheduled vehicles. The judgment was entered October 15, 1998. LACMTA and Nueva appeal.

STANDARD OF REVIEW

We review a grant of summary judgment de novo. *Robi v. Reed,* 173 F.3d 736, 739 (9th Cir.1999).

THE JOHN DEERE POLICY

We begin with an examination of the relevant terms and provisions of the policy itself. The John Deere Policy was issued to Sahota on or about August 21, 1995 and was in force at the time of the accident. The policy obligated John Deere to pay all sums that an "insured" is legally obligated to pay for bodily injury or property damage caused by an accident and resulting from the use of a covered automobile under the policy.

The policy's relevant definition of "WHO IS AN INSURED" is as follows:

(a) You for any covered auto;

(b) Anyone else while using with your permission a covered "auto" you own, hire or borrow . . ."

The focus of our inquiry is John Deere's obligation to indemnify Garcha and Blue Star, who were permissive users of Sahota's trailer. We will therefore focus on the definition of "insured" contained in part (b), which limits permissive user coverage to "covered autos".

We thus turn to the question of what is a "covered auto". Section I of the policy entitled COVERED AUTOS defines SPECIFICALLY DESCRIBED "AUTOS" as follows:

> Only those "autos" described in ITEM THREE of the Declarations for which a premium charge is shown (and for Liability Coverage any "trailers" you don't own while attached to any power unit described in ITEM THREE).

Neither the trailer nor any other vehicle or portion of any vehicle involved in this accident was listed in ITEM THREE of Sahota's policy.[2]

Therefore, as a threshold matter, we note that the trailer is not a covered auto. Consequently, since Garcha and Blue Star were permissive users of a non-covered auto, they are not "insureds" per the underlying policy's express terms. However, our inquiry does not end here. The John Deere Policy was amended and supplemented by form MCS-90 endorsement for Motor Carrier Policies of Insurance For Public Liability Under Sections 29 and 30 of the Motor Car-

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[2] The fact that the vehicle involved in this accident is the Great Dane trailer is of no import because the policy's definition of "automobile" includes trailers.

rier Act of 1980,[3] ("MCS-90") as required at the time by 49 US.C. § 10927. The endorsement stated, in pertinent part:

> In consideration of the premium stated in the policy to which this endorsement is attached, the insurer (the company) agrees to pay, within the limits of liability described herein, any final judgment recovered against the insured for *public liability* resulting from negligence in the operation, maintenance or use of motor vehicles subject to the financial responsibility requirements of Sections 29 and 30 of the Motor Carrier Act of 1980 *regardless of whether or not each motor vehicle is specifically described in the policy* . . . It is understood and agreed that no condition, provision, stipulation, or limitations contained in the policy, this endorsement, or any other endorsement thereon, or violation thereof, shall relieve the company from liability or from the payment of any final judgment, within the limits of liability herein described, irrespective of the financial condition, insolvency or bankruptcy of the insured. However, all terms, conditions, and limitations in the policy to which the endorsement is attached shall remain in full force and effect as binding between the insured and the company. The insured agrees to reimburse

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[3] An ICC endorsement, an MCS-90, is required to be attached to any liability policy issued to a certified interstate carrier. *See* 49 C.F.R. § 1003.3. The endorsement is designed to eliminate the possibility of denial of coverage by an insurer based upon an excess "other insurance" clause or other limiting provisions contained in the policy. *See* 49 C.F.R. 387.15 (containing the form endorsement). The ICC was abolished by Congress in 1995. *See* ICC Termination Act, 109 Stat. 803 (1995). The ICC's authority to regulate motor carriers was transferred to the Department of Transportation, See 49 U.S.C. § 13501 et seq., but the old ICC regulations remain in effect until the new regulations are promulgated.

the company for any payment made by the company on account of any accident, claim, or suit involving a breach of the terms of the policy, and for any payment that the company would not have been obligated to make under the provisions of the policy except for the agreement contained in this endorsement. (Emphasis added).[4]

DISCUSSION

Federal law applies to the operation and effect of ICC-mandated endorsements. *See Planet Ins. Co. v. Transport Indem. Co.*, 823 F.2d 285, 288 (9th Cir.1987); *see also Canal Ins. Co. v. First General Ins. Co.*, 889 F.2d 604, 610 (5th Cir.1989), modified on other grounds, 901 F.2d 45 (5th Cir.1990); *Ford Motor Co. v. Transport Indem. Co.*, 795 F.2d 538, 545 (6th Cir.1986); *In re Yale Express Sys., Inc.*, 362 F.2d 111, 114 (2d Cir.1966).

The question before us is whether the MCS-90 endorsement to Sahota's policy obligates John Deere to indemnify Garcha and Blue Star in the underlying action. The Appellants argue that the MCS-90 endorsement to Sahota's policy negates the limiting definition of "covered auto" in part (b) of the policy. By extension, they argue that part (b)'s definition of "WHO IS AN INSURED" is thus modified to include permissive users of non-covered autos. Accordingly, they contend that John Deere cannot rely on these limiting provisions of the underlying policy to avoid the indemnification duties invoked by the endorsement. John Deere disagrees and argues that it is not legally liable for judgments against parties other than its named insured and that the definition of "insured" is not altered by the MCS-90 endorsement. John

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[4] Pursuant to the MCS-90 endorsement, "motor vehicle" is defined to include trailers.

Deere maintains that while the MCS-90 may negate the "covered auto" limitation in part (a) of the "WHO IS AN INSURED" section, it does not negate the "covered auto" limitation for permissive users in part (b).

The district court relied heavily on our decision in *Harco Nat. Ins. Co., v. Bobac Trucking, Inc.,* 107 F.3d 733 (9th Cir.1997) in finding for John Deere. The court read *Harco* as creating a dichotomy between the inclusive "coverage" provided under an insurance policy and the distinct and separate "reimbursable obligation" imposed by an MCS-90. The court reasoned that because Garcha was not a named insured and because he drove a non-covered auto, John Deere owed no duty to indemnify because "the MCS-90 . . . [does] not vary the terms of the policy so as to create "coverage" where it did not formerly exist; [it imposes] only a reimbursable obligation as to final judgments rendered against the named insured."

We conclude that the district court's reliance on *Harco* was misplaced. Furthermore, we disagree with the court's reading of the MCS-90, which we conclude does provide for indemnification under the factual circumstances of this case.

In *Harco,* we considered whether an MCS-90 endorsement created a duty on the part of an insurer to defend its insured in an underlying personal injury action involving a vehicle not covered under the main policy. The insured had argued that the MCS-90 endorsement superseded the limiting language of the policy, in which a duty to defend existed only as to "covered autos." In resolving the claim in favor of Harco, we observed that "federal courts have consistently stated that the MCS-90 endorsement does not create a duty to defend claims which are not covered by the policy but only by the endorsement." *Id.,* 107 F.3d at 735-36 (internal citations omitted).

Harco is distinguishable on a number of grounds. First

and foremost, *Harco* dealt solely with a duty to defend and did not address a duty to indemnify. *See id.* at 735. These two duties are separate and distinct, a fact we recognized when we noted that "the reimbursement provision of the MCS- 90 is inconsistent with implying a duty to defend." *Id.* at 736. The most notable distinction between the two duties is that while the MCS-90 *explicitly* imposes a duty to indemnify an insured for liability related to non-covered autos, it is silent about a duty to defend an insured for non-covered autos. Insofar as *Harco* held that the MCS-90 does not implicitly create a duty to defend, this holding is irrelevant when considering a duty to indemnify because, as noted, the MCS-90's sole purpose is to create such a duty.

Furthermore, under the MCS-90 endorsement, as between the insured and insurer, all limitations, endorsements and other terms and conditions of the policy remain in effect. *See id.* at 736. Since the *Harco* policy, on its own terms, did not contain a duty to defend for non-covered autos, and those policy terms remained in effect as between the insured and insurer, the MCS-90 did not extend "coverage" to create such a duty. *See id.* The instant case differs in the crucial respect that the MCS-90 *explicitly* provides that John Deere must indemnify its insured for non-covered autos, thus expressly negating the covered auto limitation in the main policy.

Finally, the dispute in *Harco* was between an insurer and its insured and as we recognized, "[t]he purpose of the MCS-90 is to protect the public, not to create a windfall to the insured." *Id.* (internal citation omitted). It is well-established that the primary purpose of the MCS-90 is to assure that injured members of the public are able to obtain judgment from negligent authorized interstate carriers. *See id.* at 736 (citing *Canal* 889 F.2d at 611) (other citations omitted); *see also Adams v. Royal Indem. Co.*, 99 F.3d 964, 968 (10th Cir.1996) ("By requiring all such described insur-

ance policies to contain this ICC endorsement, the ICC prevents the possibility that, through inadvertence or otherwise, some vehicles may be left off a policy to the detriment of the public.") (internal citation omitted); *Empire Fire and Marine Ins. Co., v. Guaranty National Ins. Co.,* 868 F.2d 357, 362-63 (10th Cir.1989) ("[T]he ICC endorsement that is the subject of this appeal had its origin in the ICC's desire that the public be adequately protected when a licensed carrier uses a leased vehicle to transport goods pursuant to an ICC certificate.") (internal citations omitted).[5]

The Appellants in the instant case are injured members of the public, and thus are precisely the group meant to be protected by the MCS-90. Consequently, the policy considerations inherent in this dispute did not play a role in *Harco* and the case's applicability is even further limited. *See Harco,* 107 F.3d at 736 (finding that plaintiff's proffered distinction between disputes between insurers, and disputes between an insurer and an insured, was meaningless because "[t]he public protection purpose has been served here[.]")

In sum, though the district court and John Deere place enormous emphasis on *Harco*'s statement regarding the limitation of "coverage" to specifically described vehicles, we conclude that *Harco*'s reasoning and analysis provide no guidance to our resolution of the instant case. Similarly John Deere's reliance on *John Deere Ins. Co. v. Truckin' USA,* 122 F.3d 270 (5th Cir.1997), is misplaced. That case involved the death of Mr. and Mrs. Kurocik as a result of an accident with a tractor/trailer rig owned by Truckin' USA. *See id.* at 271. Their heirs sued multiple defendants, including Copp Trucking Inc., whose name appeared on the tractor

[5] We note that there is no functional difference between a leased vehicle or a borrowed vehicle when the focus of the inquiry is the duty owed to an injured member of the public. Attempts to circumscribe liability by the use of leased *or* borrowed vehicles was the impetus behind the ICC's mandating the MCS-90 endorsement. *See Empire,* 868 F.2d at 361.

rig. *See id.* at 271-72. Transport Insurance Co. insured Copp trucking. Transport settled the Kurocik heirs' claims against Copp. Truckin' USA carried an insurance policy with John Deere Insurance. Transport sought reimbursement from John Deere for the settlement amount it paid on behalf of Copp since the tractor trailer was owned by Truckin' USA, John Deere's insured. *See id.*

The Fifth Circuit held that because the policy did not name Copp Trucking as an insured, the MCS-90 provided no basis for relief. *See id.* at 275. The court stated that "where an insurance policy does not provide coverage for non-listed vehicles except to third-party members of the public through operation of the endorsement, the policy provides no coverage for purposes of disputes among insurers over ultimate liability." *Id.* This is an unremarkable assertion given that the integral purpose of the MCS-90, to protect third party members of the public, is not implicated in a dispute between two insurers. *See Carolina Cas. Ins. Co. v. Underwriters Ins. Co.*, 569 F.2d 304, 313 (5th Cir.1978) ("ICC Policy factors are frequently determinative where protection of a member of the public ... is at stake, but those factors cannot be invoked by another insurance company which has contracted to insure a specific risk and which needs no equivalent protection."). We again note that the Appellants in this case are injured members of the public seeking redress. Therefore, John Deere's reliance on *Truckin' USA* is misplaced.

As we noted at the outset, this Circuit has not previously considered the precise question presented in this appeal. However, the Tenth Circuit, on nearly identical facts, concluded that an MCS-90 endorsement requires an insurer to indemnify a permissive user of a non-covered auto. *See Adams*, 99 F.3d at 968.

In *Adams*, Royal Indemnity Company ("Royal") issued two pertinent insurance policies. First, Royal issued a policy

to Thomas, a member of the partnership that owned a vehicle known as Trailer 701. The partnership had leased the trailer to Geigley. Second, Royal issued a policy to Geigley. Both policies included the MCS-90 endorsement. Trailer 701 was not a covered vehicle under either policy. Geigley lent Trailer 701 to Hofer. While driving a tractor/trailer unit which included Trailer 701, Hofer negligently caused an accident that severely injured Adams. *See id.* at 964-65. Adams sued Hofer in state court and obtained a default judgment of approximately $1 million. Adams was unable to obtain the judgment from Hofer and thus brought an action against Royal claiming that it had a duty to indemnify Hofer by virtue of the MCS-90 endorsements on Geigley and Thomas's policies. *See id.* at 965-66.

Adams held that the MCS-90 endorsement had the effect of expanding coverage to Hofer under Geigley's policy. *See id.* at 971. The court noted that the endorsement indirectly modified Royal's policy definition of "insured" which limited coverage to a person using a "covered auto". *See id.* Because of this modification, the court concluded that Hofer constituted an "insured" under Geigley's policy. *See id.* Significantly, *Adams* concluded that the definition of insured as modified by the endorsement would effectively read "Anyone else is an insured while using with your permission an auto you own, hire, or borrow . . ." *Adams*, 99 F.3d at 971. Accordingly, Royal was obligated to indemnify Hofer for the judgment to Adams.[6] *See id.* at 972. We agree with

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[6] John Deere attempts to distinguish *Adams* based on the court's second conclusion that Thomas's policy did *not* apply to the trailer because, at the time of the accident, Thomas neither owned nor had control over the trailer since it was owned by the partnership and not by Thomas individually. *See id.* at 971. This argument is unavailing however, because in the instant case it is undisputed that Sahota owned the Great Dane trailer.

the reasoning expressed in *Adams*.

The critical language in the endorsement is the provision which states that "the insurer agrees to pay . . . any final judgment recovered against the insured for public liability . . . *regardless of whether or not each motor vehicle is specifically described in the policy* [.]" (emphasis added). This language indicates that whatever limitation a policy expresses regarding coverage extending only to "covered" or "specified" autos, this limitation ceases to operate when an injured member of the public seeks indemnification on behalf of the "insured". *See Empire,* 868 F.2d at 362 (The MCS-90 "negates any inconsistent limiting provisions in the insurance policy to which it is attached[.]"). Furthermore, a policy containing the MCS-90 "cannot explicitly limit liability to those vehicles specifically described therein, nor can it indirectly so limit coverage by attempting to define who is an insured in terms of specifically described vehicles." *Adams,* 99 F.3d at 970; *See also Canal* 889 F.2d at 610 (recognizing that the MCS-90 reads excess and other- insurance clauses out of the policy as against injured members of the public.)

John Deere asks us to read the use of the word "insured" in the endorsement as referring only to its named "insured", Sahota. In other words, John Deere maintains that the MCS-90 only negates the "covered auto" limitation with regard to the named insured, and would not impact its obligations regarding permissive users. However, we decline to limit the endorsement in this manner. Under John Deere's proffered interpretation, the MCS-90 negates the express provision in part (a) of the "WHO IS AN INSURED" section of the policy which limits coverage to only "covered autos." This is so because without the endorsement, Sahota would not be an "insured" under the policy if he caused injury while driving a non-covered auto. It is the endorsement that would transform him into an "insured". Thus, it is inescap-

able that the effect of the MCS-90 endorsement is to modify the policy's definition of an "insured." Yet John Deere nonetheless argues that the same provision of the endorsement is meaningless when applied to a different part of the same section of the policy.

We can see no rational basis for distinguishing between the endorsement's effect on the part (a) definition of "insured" and its effect on the part (b) definition. Had Garcha and Blue Star been driving a covered auto under the policy, they would have been covered as "insureds" under the policy per the express definition in part (b). We conclude that the MCS-90 operates in exactly the same manner when applied to the definition of "insured" in part (b) as it does when applied to part (a). In both cases, the MCS-90 negates the limitation that only users of "covered autos" are "insureds". Therefore, we conclude that under the policy before us, John Deere cannot avoid indemnifying Garcha and Blue Star by relying on the policy's narrow definition of "insured" which attempts to limit that status to permissive users of solely "covered autos". *See Adams,* 99 F.3d at 970.

We note that our interpretation of the endorsement effectuates its intended purpose of assuring that the insurer is available as a financially responsible party on behalf of the authorized carrier, so that injured members of the public are able to collect judgments obtained against these carriers. *See Adams* 99 F.3d at 968-69. Garcha and Blue Star were authorized carriers using Sahota's trailer with permission, and Nueva and LACMTA are injured members of the public. Under these circumstances, the MCS-90 serves the purpose it was expressly designed to serve, modifying a policy to insure the availability of insurance for negligently injured members of the public. Interpreting the endorsement in the way advocated by John Deere would frustrate this express Congressional goal.

In conclusion, it is undisputed that Garcha and Blue Star

were using the Great Dane trailer with Sahota's permission at the time of the accident and that the trailer was, at that time, a regulated vehicle that Sahota owned. Therefore, Garcha and Blue Star are "insureds" under the MCS-90 modification to the Sahota policy and John Deere is liable to the Appellants for any judgment against Garcha and Blue Star up to the policy maximum.

CALIFORNIA PERMISSIVE USER STATUTE

The district court also ruled against the Appellants on their claim that Garcha and Blue Star should be afforded coverage under California Insurance Code § 11580.1. Given that we have decided in the Appellants' favor under federal law, we decline to reach their state statutory claim.

CONCLUSION

For the reasons stated, we REVERSE the district court's ruling that John Deere is not liable to LACMTA and Nueva under the Sahota policy as modified by the MCS-90 endorsement, and we REMAND for further proceedings on that claim.

REVERSED and REMANDED.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CV 98-0036 LGB (JGx)

JOHN DEERE INSURANCE COMPANY,
Plaintiff,
v.
GUILLERMO NUEVA, LOS ANGELES COUNTY METROPOLITAN TRANSPORTATION AUTHORITY, *et al.*,
Defendants.

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT, AND DISMISSING SAHOTA AND SAHOTA TRUCKING FOR LACK OF PROSECUTION

I. INTRODUCTION

Cross-motions for summary judgment filed by plaintiff John Deere Insurance Company ("Deere") and defendants L.A. County Metropolitan Transportation Authority ("MTA") and Guillermo Nueva ("Nueva") came on regularly for hearing on July 6, 1998. Having carefully considered the papers filed and oral argument of counsel, the Court hereby GRANTS plaintiff John Deere Insurance Company's motion for summary judgment and DENIES defendants L.A. County Metropolitan Transportation Authority's motion for sum-

mary judgment.

This case arises from a multi-vehicle collision involving automobiles, a tractor-semi-trailer, and an MTA bus, that took place on November 24, 1995.[7] The cross-motions currently before the Court address the same two issues: whether a trailer, owned by John Deere's insured, and involved in the collision, is a covered auto under the John Deere policy, alone or as amended by the MSC-90 and PUC endorsements; and whether John Deere must provide coverage to permissive users of that trailer.

On January 5, 1998, plaintiff Deere filed its original Complaint, seeking declaratory judgment respecting its duty to defend or indemnify any of a large number of defendants involved in the collision. In the collision, a car operated by defendant Dedric Mangum ("Mangum") collided with a car operated by defendant Joo Sang Lee ("Lee"). A tractor-semi-trailer and an MTA bus were also involved. Deere filed the currently-operative First Amended Complaint ("1AC") on February 6, 1998, seeking declaratory relief against defendants Guillermo Nueva (an MTA bus operator); Gurmukh Singh Garcha (alleged operator of a tractor-semi-trailer combination); Southwestern Carriers (Garcha's employer); Lee; Mangum; Baljit Sahota (Deere's insured, who had alleged sold the tractor-semi-trailer); Sahota Trucking (Sahota's dba); Blue Star Trucking aka Blue Star Transportation (who had allegedly bought the tractor-semi-trailer); Los Angeles County Metropolitan Transportation Authority ("MTA"); Progressive Northwestern Insurance Company; and individuals Inderjit Singh, Rashpal Singh, and Tarsem Singh. On March 20, 1998, defendant MTA filed a counterclaim against Deere and a cross-claim against all the other

[7] The Complaint and 1AC allege that the accident occurred December 24, 1995. (1AC ¶ 19.) However, in the Stipulated Statement filed in support of these cross-motions, the date is November 24, 1995. (Stipulated Fact 3.)

defendants except Nueva, driver of the MTA bus. By its counterclaim and cross-claim, MTA seeks declaratory judgment regarding who is an insured under the policy, and regarding Deere's duty to defend and indemnify any such insured.

On March 19, 1998, this Court issued plaintiff Deere an Order to Show Cause on or before April 9, 1998 why this action should not be dismissed for lack of prosecution as to defendants Garmukh Singh Garcha, Joo Sang Lee, Blue Star Trucking, Dedric Mangum, Inderjit Singh, and Rashpal Singh. No Response was filed, and by Order entered April 17, 1998, these defendants were dismissed from the action. On April 30, 1998, Deere filed an *Ex Parte* Application to vacate the dismissal of these defendants, which was granted by Order entered May 11, 1998. On June 5, 1998, plaintiff filed a proof of service as to each of these defendants.

On April 16, 1998, this court issued Plaintiff Deere an Order to Show Cause on or before May 8, 1998 why the action should not be dismissed for lack of prosecution as to Sahota Trucking, Baljit Sahota, Progressive Northwestern Insurance Company, Tarsem Singh, and Southwestern Carriers.

On April 29, 1998, plaintiff filed a voluntary dismissal of defendant Southwestern Carriers, Progressive Northwestern Insurance Company, and Tarsem Singh. By Minute Order May 12, 1998, this Court granted plaintiff's request for an extension of time to serve defendants Baljit Sahota and Sahota Trucking, until June 8, 1998. As of July 1, 1998, Deere has filed no proof of service as to Sahota and Sahota Trucking, and these defendants and therefore DISMISSED WITHOUT PREJUDICE for lack of prosecution.

On May 29, 1998, defendant MTA filed its motion for summary judgment. On June 4, 1998, Deere filed its Opposition, which contains its own motion for summary

judgment. MTA's Opposition to Deere's motion and Reply in support of its own motion was filed June 15, 1998. Deere's Reply in support of its own motion was filed June 17, 1998.

II. FACTUAL BACKGROUND

The following facts are relevant and undisputed:

A. Accident Facts

On or about November 24, 1995, a vehicular accident occurred on the freeway when a 1992 Chevrolet Cavalier, owned by nonparties Gelco Corporation U.S.A. and Burns International, and operated by defendant Mangum, collided with a white 4-door 1990 Nissan automobile driven by defendant Lee. (Stip. Fact 3.) Following this collision, an MTA bus operated by defendant and MTA employee Nueva was stopped on the freeway, with its flashers blinking, to avoid the collision. (Stip. Fact 4.) Nueva was acting in the course and scope of his employment with the MTA at the time. (Stip. Fact 4.) While stopped, the MTA bus was rear-ended by a tractor/trailer unit. (Stip. Fact 4.)

The tractor/trailer unit that rear-ended Nueva and the MTA consisted of a 1995 Peterbilt tractor, California license SP4146 ("the Peterbilt tractor"), pulling a 1987 Great Dane Trailer, California license FT45828, VIN # 1GRAA9621HS054301 ("the Great Dane Trailer.") (Stip. Fact 5.)

The driver/operator of the truck/trailer unit at the time of the accident was defendant Garcha. (Stip. Fact 6.) The owners of the Peterbilt tractor at the time of the accident were Garcha, dba defendant Blue Star Trucking ("Blue Star"), and defendant Inderjit Singh ("I. Singh"). (Stip. Fact 7.) The registered owner of the Great Dane trailer at the time of the accident was defendant Sahota Trucking. (Stip. Fact 8.)

Prior to the accident, I. Singh and Garcha of Blue Star had entered into a purchase agreement with Sahota Trucking for the purchase of the Great Dane trailer, but the final payment had not been made and legal title had not passed to Blue Star at the time of the accident. (Stip. Fact 9.)

As a result of the accident, Nueva was injured and MTA paid workers' compensation benefits to or on behalf of Nueva, in the amount of $39,233,74 as of April 27, 1998, and continuing. (Stip. Fact 10.) The accident also resulted in $101,953.65 damage to the bus. (Stip. Fact 11.)

On November 13, 1996, Nueva filed a personal injury lawsuit relating to this accident in Los Angeles superior Court against Garcha, Southwestern Carriers, Joo Lee, Sahota Trucking, Baljit Sahota, Servs, Inc., and Blue Star Trucking. *G. Nueva v. Garcha, et. al.*, TC 009 762. (Stip. Facts 12 and 13; Exh. B.) The MTA filed a complaint in intervention on December 18, 1996 against all the same defendants, seeking reimbursement of the property damages to the bus and the workers' compensation paid to Nueva. (Stip. Fact 15; Exh. C.) The MTA has filed defaults against Blue Star Trucking, Joo Lee, I. Singh, and Garcha in the Superior Court case. (Stip. Fact 14.)

B. Policy-Related Facts

1. The John Deere Policy

On or about August 21, 1995, Deere issued its insurance policy No. 734326-7695-954 to Baljit Sahota dba Sahota Trucking ("the policy"). (Stip. Fact 1; Exh. A.) The policy was in force on the date of this accident. (Stip. Fact 2.)

The Great Dane Trailer was not a scheduled vehicle under the John Deere policy. (Stip. Fact 16.) No vehicle or any portion of any vehicle involved in this accident was a scheduled vehicle under the John Deere policy. (Stip. Fact

17.)

Under the Policy, "Auto" is defined in pertinent part as "a land motor vehicle, trailer or semi-trailer." (Deere's Statement Exh. a, p. 43.) Sahota's policy Truckers Coverage Form Declarations indicates "46" under "Covered Autos." The code "46" is defined as follows:

> 46 = specifically Described "Autos." Only those "autos" described in Items Three of the Declarations for which a premium charge is shown (and for Liability Coverage any "trailers" you don't own while attached to any power unit described in Item Three).

(Stip. Fact 27.) The policy further states, "The symbols entered next to a coverage on the Declarations designate the only 'autos' that are covered 'autos.'" (Stip. Fact 27.)

The Trucker's Coverage Form CA 00 12 06 92, part of the policy issued to Sahota, provides, in pertinent part, as follows:

> 1. Who Is An Insured
>
> The following are "insureds":
>
> a. You for any covered "auto."
>
> b. Anyone else while using with your permission a covered "auto" you own, hire or borrow.
>
> c. The owner or anyone else from whom you hire or borrow a covered "auto" that is a "trailer" while the "trailer" is connected to another covered "auto" that is a power unit, or, if not connected:
>
> (1) Is being used exclusively in your business as a "trucker"; and

> (2) Is being used pursuant to operating rights granted to you by a public authority.

(Stip. Fact 26.)

2. PUC Endorsement and Form MCS-90

Pursuant to Form F of the Uniform Motor Carrier Bodily Injury and Property Damage Liability Insurance Endorsement ("Form F") (Stip. Fact 18; Exh. D), the California Public Utilities Commission ("PUC") issued to Baljit Singh Sahota dba Sahota Trucking a Certificate of Insurance certifying that Deere issued the John Deere policy to Sahota ("Certificate"). (Stip. Fact 19, 20, Exh. E.)

The applicable PUC endorsement provides in pertinent part as follows:

> The policy to which this endorsement is attached . . . is hereby amended . . .
>
> In consideration of the premium stated in the policy to which this endorsement is attached, the Company hereby agrees to pay, within the limits of liability hereinafter provided, any final judgment rendered against the insured for bodily injury to or death of any person, or loss of or damage to property of others... resulting from the operation, maintenance, or use of motor vehicles and/or trailers for which a certificate of public convenience and necessity or permit is required or has been issued to the insured by the Public Utilities Commission of the State of California, regardless of whether such motor vehicles and/or trailers are specifically described in the policy or not....
>
> Within the limits of liability hereinafter provided it is further understood and agreed that

> no condition, provision, stipulation, or limitation contained in the policy, or any other endorsement thereon or violation thereof, or of this endorsement, by the insured, shall relieve the Company from any liability hereunder or from the payment of any such final judgment, irrespective of the financial responsibility or lack thereof or insolvency or bankruptcy of the insured. However, all terms, conditions, and limitations in the policy to which this endorsement is attached are to remain in full force and effect as binding between the insured and the Company, and the insured agrees to reimburse the Company for any payment made by the Company on account of any accident, claim, or suit involving a breach of the terms of the policy, and for any payment that the Company would not have been obligated to make under the provisions of the policy except for the agreement contained in this endorsement.

(Stip. Facts 21-22; Exh. F.)

The Policy was also amended by Form MCS-90, Endorsement for Motor Carrier Policies of Insurance for Public Liability under Sections 29 and 30 of the Motor Carrier Act of 1980 ("Form MCS-90"). (Stip. Fact 23; Exh. G.) the Form MCS-90 provides that the John Deere Policy is primary, with a limit of $750,000 for each accident. (Stip. Fact 24.) The Form MCS-90 also provides, in pertinent part, as follows:

> In consideration of the premium stated in the policy to which this endorsement is attached, the insurer (the company) agrees to pay, within the limits of liability described

> herein, any final judgment recovered against the insured for public liability resulting from negligence in the operations, maintenance, or use of motor vehicles subject to the financial responsibility requirements of Sections 29 and 30 of the Motor Carrier Act of 1980 regardless of whether or not each motor vehicle is specifically described in the policy.... The insured agrees to reimburse the company for any payment made by the company on account of any accident, claims, or suit involving a breach of the terms of the policy, and for any payment that the company would not have been obligated to made under the provisions of the policy except for the agreement contained in this endorsement.
>
> It is further understood and agreed that, upon failure of the company to pay any final judgment recovered against the insured as provided herein, the judgment creditor may maintain an action in any court of competent jurisdiction against the company to compel such payment.

(Stip. Fact. 25; Exh. G.)

III. ANALYSIS

A. Applicable Legal Standards

1. Summary Judgment

a. Generally

Summary judgment shall be granted if the evidence supporting the motion for summary judgment shows that

"there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A party moving for summary judgment may carry its initial burden by pointing out to the district court that there is an absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). "The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322. If the non-moving party bears the burden of proof at trial, the moving party may carry its burden by showing an absence of evidence to support the non-moving party's case. *Celotex*, 477 U.S. at 323.

To avoid summary judgment, the non-movant must set forth specific facts showing that there remains a genuine issue of material fact for trial. *Celotex*, 477 U.S. at 324. The non-movant "may not rest upon the mere allegations or denials of the adverse party's pleading." A factual dispute is "genuine" if a reasonable jury could return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in the non-movant's favor. *Id.* at 255. If the nonmoving party's evidence is merely colorable or is not significantly probative, then summary judgment may be granted. *Id.* at 249-50.

b. Summary Judgment in the Insurance Context

Interpretation of insurance policies is a matter of law. *Stanford Ranch, Inc. v. Maryland Cas. Co.*, 89 F.3d 618, 624 (9th Cir. 1996). Interpretation of statutes is also a question of law. *Forest Conservation Council v. Rosboro Lumber*

Co., 50 F.3d 781, 783 (9th Cir. 1995).

Summary judgment is often appropriate on issues involving interpretation of the insurance policy. So long as the terms of the policy are clear and unambiguous, interpretation of the policy presents an issue of law that may be resolved by summary judgment. *State Farm & Cas Co. v. Eddy*, 218 Cal.App.3d 958, 965 (1990).

Summary judgment may also be appropriate to determine whether an insurer has a duty to defend the insured. *Horace Mann Ins. Co. v. Barbara B.*, 4 Cal.4th 1076, 1080-81 (1993).

2. Applicable Insurance Law

Cal. Ins. Code §11580.1(b)(4) states, in pertinent part,

> (b) Every policy of automobile liability insurance . . . shall contain all of the following provisions:
>
> . . . .
>
> (4) Provision affording insurance to the named insured with respect to any owned or leased motor vehicle covered by such policy, and to the same extent that insurance is afforded to the named insured, to any other person using such motor vehicle, provided the use is by the named insured or with his or her permission. . . . As used in this chapter, "owned motor vehicle" includes all motor vehicles described, and rated in the polity.

In *Harco Nat. Ins. Co. v. Bobac Trucking Inc.*, 107 F.3d 733, 735-36 (9th Cir. 1997), the Ninth Circuit explicitly addressed the issue of whether an MCS-90 creates a "duty to defend" when the insurance policy at issue covered only spe-

cifically described autos, and the vehicle involved in the accident was not so described. It does not.

> [F]ederal courts have consistently stated that the MCS-90 endorsement does not create a duty to defend claims which are not covered by the policy but only by the endorsement. . . . [T]he MCS-90 does not expand coverage to autos not covered under the main policy. . . . [T]he reimbursement provision of the MCS-90 is inconsistent with implying a duty to defend.

Harco, 107 F.3d at 736. The Ninth Circuit therefore distinguished the inclusive "coverage" provided under an insurance policy from that expansion of liability imposed by the MCS-90, namely, a reimbursable obligation to pay any final judgment entered against a named insured. The Ninth Circuit explicitly distinguished an insurer's "duties under the main policy" from an "insurer's duty to pay [a final judgment] even if its insured is unable to respond to the insurer's claim for reimbursement." *Id.* Only the former includes such obligations as a duty to defend and indemnify. *Id.*

B. Discussion

In this discussion, the court will employ the distinction drawn by the Ninth Circuit, in *Harco*, supra, between an insurer's "duties under the main policy," referred to hereinafter as "coverage," and an insurer's reimbursable obligation to pay any final judgment against its named insured, referred to hereinafter as "the reimbursable obligation."

In its motion, the MTA seeks "a declaration that John Deere [Ins. Co.] has the potential duty under the John Deere policy to indemnify Garcha and Blue Star, entities which are otherwise uninsured, against the underlying action [*Nueva v. Garcha, et al.*] up to a limit of liability of $750,000, as well

as its named insured, Sahota." [MTA Mot. 2:11-14.] That is, the MTA seeks a declaration that Deere must provide "coverage" in the full sense to Garcha and Blue Star. John Deere seeks a declaration that it has no obligation whatsoever to Blue Star and Garcha, of either the full "coverage" or the narrow "reimbursable obligation" variety.

The Court's analysis will proceed in two steps. First, the Court will determine whether the John Deere policy, either standing alone or as amended by the PUC endorsement and the MCS-90, provides "coverage" for the Great Dane trailer, an unscheduled vehicle. Second, the Court will determine whether the John Deere policy, either standing alone or as amended by the PUC endorsement and the MCS-90, provides either "coverage" or a "reimbursable obligation" to Blue Star and Garcha, as "permissive users" of the Great Dane trailer.[8]

1. Does the John Deere Policy, Alone or As Amended, Provide "Coverage" For The Great Dane Trailer?

It is not disputed that the Great Dane trailer was not a scheduled vehicle on the policy. (Stip. Fact 16.)[9] Nor is it disputed that the policy itself provides coverage only to scheduled vehicles. (Stip. Fact 27.) On this basis, the Great Dane trailer, a nonscheduled vehicle, is not a covered auto

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[8] Although it is not relevant to the Court's determination of these motions, the instant federal declaratory relief action was filed in the context of the pending Superior Court action *Nueva v. Garcha*, in which the MTA has filed defaults against Blue Star, Lee, I. Singh, and Garcha. After proving the amounts for which each defaulting party is liable, the MTA and Nueva will be entitled to proceed against any available insurance. The MTA contends that the Deere policy is available.

[9] Although the policy refers to "covered autos," it is not disputed that a trailer may be a covered vehicle under the policy definitions. (Deere Statement, Exh. a, p. 43.)

under the policy itself.

Nevertheless, the MTA argues that "the trailer was a covered vehicle under the John Deere policy by virtue of the MCS-90 and PUC endorsements, regardless of the fact that it was not a vehicle scheduled in the policy." (MTA Mot. 2:6-8.)

However, under *Harco*, "[T]he MCS-90 does not expand coverage to autos not covered under the main policy." *Harco*, 107 F.3d at 736. The parties have not cited any case specifically construing the PUC endorsement. However, the relevant language of the PUC endorsement is identical to that of the MCS-90. Like the MCS-90, the PUC endorsement states, "all terms, conditions, and limitations in the policy to which this endorsement is attached are to remain in full force and effect." (Stip. Facts 21-22; Exh. F.) On that basis, the rationale of Harco applies to the PUC endorsement also.

Therefore, while the MCS-90 and PUC endorsement impose a "reimbursable obligation" on the insurer (under certain circumstances), they do not expand "coverage" beyond that provided in the policy itself. By imposing a reimbursable obligation on Deere, the MCS-90 and the PUC endorsement require Deere to pay any final judgment against its named insured, Sahota, subject to reimbursement by Sahota.[10] The MCS-90 and PUC endorsement, by their own terms, do not and cannot render the trailer a "covered vehicle," or create "coverage" for the Great Dane trailer.

Interpretation of the policy presents an issue of law that may be resolved by summary judgment, under *State Farm*, 218 Cal.App.3d at 965. The Court therefore finds that the Great Dane trailer was not a "covered vehicle" under the John Deere policy, and no "coverage" is available under the

[10] Thus it is irrelevant, as well as undisputed, that the Great Dane trailer is the type of vehicle which requires an MSC-90 and PUC endorsement, as the MTA argues at length. (MTA Mot. 14:18-16:19.)

policy.

The MTA argues, citing *Smith v. Travelers Indemnity Co.*, 32 Cal.App.3d 1010, 1016 (1973), that because Sahota's liability, if any, "arose out of" the use of the Great Dane trailer by permissive users Garcha and Blue Star, the Great Dane trailer is a covered vehicle. The MTA's argument is unavailing. In *Smith*, there was no dispute over whether the insurance policy covered the trailer. In this case, the terms of the policy clearly and unambiguously do not cover the trailer.

2. Does the John Deere Policy, Alone or As Amended, Provide "Coverage" or a "Reimbursable Obligation" to Blue Star and Garcha, as "Permissive Users" of the Great Dane Trailer?

It is undisputed that at the time of the accident, Garcha and Blue Star were "permissive users" of the trailer.[11]

The MTA argues, on this basis, that Garcha and Blue Star are additional insureds under the policy, and receive coverage equal to that of the named insured, Sahota, pursuant to Cal. Ins. Code §11580.1. The MTA seeks "a declaration that John Deere [Ins. Co.] has the potential duty under the John Deere policy to indemnify Garcha and Blue Star, entities which are otherwise uninsured, against the underlying action [*Nueva v. Garcha, et al.*] up to a limit of liability of $750, 000, as well as its named insured, Sahota." (MTA Mot. 2:11-14.) This form of insurer liability has been referred to herein as "coverage."

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[11] A significant portion of MTA's motion is devoted to establishing this fact, which is apparently not disputed by Deere. (MTA Mot. 9:1-12:16.) Although this is not one of the Facts included in the "Stipulated" Statement, Deere's Opposition to MTA's motion states, "It is undisputed that under California law Garcha and Blue Star were "permissive users" of the trailer." (Opp. 7:5-6.).

Deere argues that it owes neither coverage nor a reimbursable obligation to Garcha and Blue Star, because the Great Dane trailer was not covered by the policy, and because the MCS-90 and PUC endorsement obligate Deere to pay any final judgment for damages against Sahota only.[12] That is, Deere argues that the policy itself provides coverage to permissive users of covered autos only, while the MCS-90 and PUC endorsement create a reimbursable obligation only to Sahota, the named insured.

Under the heading, "Who Is An Insured," the Deere policy lists, inter alia, "Anyone else while using with your permission a covered "auto" you own, hire or borrow." (Stip. Fact 26.) This policy makes clear that permissive users of noncovered autos are not insureds under the policy. In this respect, the Deere policy is distinguishable from policies in cases cited by the MIA, which provided coverage for permissive users of any vehicle owned by the insured. See, e.g., *California State Automobile Assn. V. Foster*, 14 Cal.App.4th 147, 151-152; *Uber v. Ohio Casualty Ins. Co.*, 247 Cal.App.2d 611, 613 (1967) ("Each policy contained an omnibus clause insuring any person using an automobile owned by the named insured with the latter's permission"); *Somerville v. Providence Washington Indemnity Co.*, 218 Cal.App.2d 237, 242 (1963) (policy covers "any automobile owned by or in charge of the named insured"). On this basis, under the Deere policy, permissive users of covered autos are additional insureds, but permissive users of noncovered autos are not. Garcha and Blue Star are therefore not "addi-

---

[12] "There is no dispute that the MCS-90 endorsement requires John Deere to pay final judgments rendered against Sahota regardless of whether the vehicle involved in the accident is scheduled on the policy or not." (Deere's Opp. 3:21-24; Deere's Opp. 6:7-14.) Although Deere's obligation to pay is primary, Deere also contends, correctly, that under the MCS-90 Sahota will have an obligation to reimburse Deere. (Deere's Opp. 6:15-18.)

tional insureds" under the policy.

The MCS-90 and PUC endorsement do not vary the terms of the policy so as to create "coverage" where it did not formerly exist; they impose only a reimbursable obligation as to final judgments rendered against the named insured. *Harco*, 107 F.3d at 736. The MCS-90 and PUC endorsement therefore do not render Garcha and Blue Star additional insureds under the policy.

Nor does Cal. Ins. Code §11580.1(b)(4) have this effect. It is not disputed that the Deere policy provided insurance coverage to the named insured with respect only to scheduled vehicles. Thus, the requirement that the Deere policy provide coverage to permissive users "to the same extent" as it is provided to the named insured means, under Cal. Ins. Code §11580.1(b)(4), that permissive users of covered autos are covered to the same extent as the named insured. The. MTA offers no statutory or caselaw support for its characterization of Cal. Ins. Code §11580.l's "omnibus" clause as providing coverage for permissive users more inclusive than that provided to named insureds, and this court is aware of none. The policy by its own terms therefore provides permissive users, like named insureds, insurance coverage for covered autos only. The MCS-90 and PUC endorsement provide not "coverage," but payment of a final judgment, subject to reimbursement. The MCS-90 and PUC endorsement are not an insurance policy, and the MTA's attempt to apply Cal. Ins. Code §11580.1(b)(4) to an MCS-90 and PUC endorsement is therefore without legal support.

Therefore, even if the MTA is correct in characterizing Deere as having a "duty to defend and indemnify" any permissive user of a covered vehicle (see, e.g. MTA Mot. 1:4; MTA Counterclaim 10:6, 10:12), Garcha and Blue Star are not such entities. Rather, Garcha and Blue Star are permissive users of a noncovered vehicle. As the policy terms are "clear and unambiguous," summary judgment is appro-

priate under *State Farm*, supra. The Court therefore finds that the John Deere policy does not provide coverage to Garcha and Blue Star, as permissive users of a noncovered auto. John Deere Insurance Company has no duty to defend or indemnify Garcha and Blue Star under the policy issued by John Deere to Sahota, either alone or as amended by the PUC endorsement and the MCS-90. Nor does John Deere Insurance Company have a reimbursable obligation to pay any final judgment entered against Garcha and Blue Star. That reimbursable obligation is to its named inured alone.

IV. CONCLUSION

On the basis of the foregoing, summary judgment is GRANTED in favor of John Deere Insurance that John Deere Insurance Company owes no duty to defend or indemnify Garcha and Blue Star in the underlying action, nor to pay any final judgment entered against them subject to a right of reimbursement. The MTA's motion for summary judgment is therefore DENIED. Defendants Sahota and Sahota Trucking are DISMISSED for lack of prosecution.

IT IS SO ORDERED.

Dated: _____

_____
LOURDES G. BAIRD
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 98-56464

D.C. No. CV-98-00036-LGB

JOHN DEERE INSURANCE COMPANY,

an Illinois corporation,

Plaintiff-cross-defendant-Appellee,

v.

GUILLERMO NUEVA,

Defendant-Appellant,

LOS ANGELES COUNTY METROPOLITAN TRANSPORTATION AUTHORITY,

Defendant-cross-claimant-Appellant,

and

JOO SANG LEE, DEDRIC MANGUM, RASHPAL SINGH, GURMUKH SINGH GARCHA, BLUE STAR TRUCKING, aka Blue Star Transportation, INDERJIT SINGH, SOUTHWESTERN CARRIERS, BALJIT SAHOTA, PROGRESSIVE NORTHWESTERN INSURANCE COMPANY, TARSEM SINGH,

Defendants-Cross-defendants.

ORDER

FILED December 26, 2000

Cathy A. Catterson, Clerk

U.S. Court of Appeals

Before: HUG and FERGUSON, Circuit Judges, and RESTANI,[13] Court of International Trade Judge.

Judge Hug voted to deny appellee's petition for rehearing en banc. Judge Ferguson and Judge Restani have voted to recommend denying the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35(b).

The petition for rehearing en banc is DENIED.

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[13] The Honorable Jane A. Restani, Judge of the Court of International Trade, sitting by designation.

APPENDIX D

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the ICC Termination Act of 1995 are codified at 49 U.S.C. §§ 13901 *et seq*. as follows:

§ 13901. Requirement for registration

A person may provide transportation or service subject to jurisdiction under subchapter I or III of chapter 135 or be a broker for transportation subject to jurisdiction under subchapter I of that chapter, only if the person is registered under this chapter to provide the transportation or service.

§ 13902. Registration of Motor Carriers

(a) Motor Carrier Generally. –

(1) In general. -- Except as provided in this section, the Secretary shall register a person to provide transportation subject to jurisdiction under subchapter I of chapter 135 of this title as a motor carrier if the Secretary finds that the person is willing and able to comply with –

(A) this part and the applicable regulations of the Secretary and the Board;

(B) any safety regulations imposed by the Secretary and the safety fitness requirements established by the Secretary under section 31144; and

(C) the minimum financial responsibility requirements established by the Secretary pursuant to sections 13906 and 31138.

§ 13906. Security of motor carriers, brokers, and freight forwarders

(a) Motor carrier requirements.—

(1) Liability insurance requirement.—The Secretary may register a motor carrier under section 13902 only if the registrant files with the Secretary a bond, insurance policy, or other type of security approved by the Secretary, in an amount not less than such amount as the Secretary prescribes pursuant to, or as is required by, sections 31138 and 31139, and the laws of the State or States in which the registrant is operating, to the extent applicable. The security must be sufficient to pay, not more than the amount of the security, for each final judgment against the registrant for bodily injury to, or death of, an individual resulting from the negligent operation, maintenance, or use of motor vehicles, or for loss or damage to property (except property referred to in paragraph (3) of this subsection), or both. A registration remains in effect only as long as the registrant continues to satisfy the security requirements of this paragraph.

APPENDIX E

REGULATORY PROVISIONS INVOLVED

Pertinent provisions of the federal regulations governing motor carriers are printed at 49 C.F.R. § 387.1 *et seq.* as follows:

§ 387.1. Purpose and scope.

This subpart prescribes the minimum levels of financial responsibility required to be maintained by motor carriers of property operating motor vehicles in interstate, foreign, or intrastate commerce. The purpose of these regulations is to create additional incentives to motor carriers to maintain and operate their vehicles in a safe manner and to assure that motor carriers maintain an appropriate level of financial responsibility for motor vehicles operated on public highways.

[46 FR 30982, June 11, 1981, as amended at 48 FR 52683, Nov. 21, 1983]

§ 387.7. Financial responsibility required.

(a) No motor carrier shall operate a motor vehicle until the motor carrier has obtained and has in effect the minimum levels of financial responsibility as set forth in Sec. 387.9 of this subpart.

. . . .

(d) Proof of the required financial responsibility shall be maintained at the motor carrier's principal place of business. The proof shall consist of—

(1) "Endorsement(s) for Motor Carrier Policies of Insurance for Public Liability Under Sections 29 and 30 of the Motor Carrier Act of 1980" (Form MCS-90) issued by an insurer(s);

(2) A "Motor Carrier Surety Bond for Public Liabil-

ity Under Section 30 of the Motor Carrier Act of 1980" (Form MCS-82) issued by a surety; or

(3) A written decision, order, or authorization of the Interstate Commerce Commission authorizing a motor carrier to self-insure under Sec. 1043.5 of this title, provided the motor carrier maintains a satisfactory safety rating as determined by the Federal Highway Administration under part 385 of this title.

(e) The proof of minimum levels of financial responsibility required by this section shall be considered public information and be produced for review upon reasonable request by a member of the public.

(f) All vehicles operated within the United States by motor carriers domiciled in a contiguous foreign country, shall have on board the vehicle a legible copy, in English, of the proof of the required financial responsibility (Form MCS-90 or MCS-82) used by the motor carrier to comply with paragraph (d) of this section.

(g) Any motor vehicle in which there is no evidence of financial responsibility required by paragraph (f) of this section shall be denied entry into the United States.

[46 FR 30982, June 11, 1981; 46 FR 45612, Sept. 14, 1981, as amended at 48 FR 5559, Feb. 7, 1983; 48 FR 52683, Nov. 21, 1983; 51 FR 22083, June 18, 1986; 54 FR 49092, Nov. 29, 1989; 59 FR 63923, Dec. 12, 1994]

§ 387.15. Forms

Endorsements for policies of insurance (Illustration I) and surety bonds (Illustration II) must be in the form prescribed by the FHWA and approved by the OMB. Endorsements to policies of insurance and surety bonds shall specify that coverage thereunder will remain in effect continuously until terminated, as required in Sec. 387.7 of this subpart.

The continuous coverage requirement does not apply to Mexican motor carriers insured under Sec. 387.7(b)(3) of this subpart. The endorsement and surety bond shall be issued in the exact name of the motor carrier.

ILLUSTRATION I

Form MCS-90 (3/82)

Form Approved

OMB No. 2125-0074

ENDORSEMENT FOR MOTOR CARRIER POLICIES OF INSURANCE FOR PUBLIC LIABILITY UNDER SECTIONS 29 AND 30 OF THE MOTOR CARRIER ACT OF 1980

Issued to_____

of _____

Dated at_____

this ____ day of _____, 19____

Amending Policy No._____

Effective Date_____

Name of Insurance Company_____

Countersigned by_____

Authorized Company Representative

The policy to which this endorsement is attached provides primary or excess insurance, as indicated by "X", for the limits shown:

☐ This insurance is primary and the company shall not be liable for amounts in excess of $_____ for each accident.

☐ This insurance is excess and the company shall not be

liable for amounts in excess of $_____ for each accident in excess of the underlying limit of $_____ for each accident.

Whenever required by the FHWA or the ICC the company agrees to furnish the FHWA or the ICC a duplicate of said policy and all its endorsements. The company also agrees, upon telephone request by an authorized representative of the FHWA or the ICC, to verify that the policy is in force as of a particular date. The telephone number to call is:

_____

Cancellation of this endorsement may be effected by the company or the insured by giving (1) thirty-five (35) days notice in writing to the other party (said 35 days notice to commence from the date the notice is mailed, proof of mailing shall be sufficient proof of notice), and (2) if the insured is subject to the ICC's jurisdiction, by providing thirty (30) days notice to the ICC (said 30 days notice to commence from the date the notice is received by the ICC at its office in Washington, DC).

DEFINITIONS AS USED IN THIS ENDORSEMENT

Accident includes continuous or repeated exposure to conditions which results in bodily injury, property damage, or environmental damage which the insured neither expected or intended.

Motor Vehicle means a land vehicle, machine, truck, tractor, trailer, or semitrailer propelled or drawn by mechanical power and used on a highway for transporting property, or any combination thereof.

Bodily Injury means injury to the body, sickness, or disease to any person, including death resulting from any of these.

Environmental Restoration means restitution for the loss, damage, or destruction of natural resources arising out of the

accidental discharge, dispersal, release or escape into or upon the land, atmosphere, watercourse, or body of water, of any commodity transported by a motor carrier. This shall include the cost of removal and the cost of necessary measures taken to minimize or mitigate damage to human health, the natural environment, fish, shellfish, and wildlife.

Property Damage means damage to or loss of use of tangible property.

Public Liability means liability for bodily injury, property damage, and environmental restoration.

The insurance policy to which this endorsement is attached provides automobile liability insurance and is amended to assure compliance by the insured, within the limits stated herein, as a motor carrier of property, with sections 29 and 30 of the Motor Carrier Act of 1980 and the rules and regulations of the Federal Highway Administration and the Interstate Commerce Commission (ICC).

In consideration of the premium stated in the policy to which this endorsement is attached, the insurer (the company) agrees to pay, within the limits of liability described herein, any final judgment recovered against the insured for public liability resulting from negligence in the operation, maintenance or use of motor vehicles subject to the financial responsibility requirements of sections 29 and 30 of the Motor Carrier Act of 1980 regardless of whether or not each motor vehicle is specifically described in the policy and whether or not such negligence occurs on any route or in any territory authorized to be served by the insured or elsewhere. Such insurance as is afforded, for public liability, does not apply to injury to or death of the insured's employees while engaged in the course of their employment, or property transported by the insured, designated as cargo. It is understood and agreed that no condition, provision, stipulation, or limitation contained in the policy, this endorsement, or any

other endorsement thereon, or violation thereof, shall relieve the company from liability or from the payment of any final judgment, within the limits of liability herein described, irrespective of the financial condition, insolvency or bankruptcy of the insured. However, all terms, conditions, and limitations in the policy to which the endorsement is attached shall remain in full force and effect as binding between the insured and the company. The insured agrees to reimburse the company for any payment made by the company on account of any accident, claim, or suit involving a breach of the terms of the policy, and for any payment that the company would not have been obligated to make under the provisions of the policy except for the agreement contained in this endorsement.

It is further understood and agreed that, upon failure of the company to pay any final judgment recovered against the insured as provided herein, the judgment creditor may maintain an action in any court of competent jurisdiction against the company to compel such payment.

The limits of the company's liability for the amounts prescribed in this endorsement apply separately to each accident and any payment under the policy because of any one accident shall not operate to reduce the liability of the company for the payment of final judgments resulting from any other accident.

§ 387.301. Surety bond, certificate of insurance, or other securities.

(a) *Public liability.* (1) No common or contract carrier or foreign (Mexican) motor private carrier or foreign motor carrier transporting exempt commodities subject to subchapter II, chapter 105, subtitle IV of title 49 of the U.S. Code shall engage in interstate or foreign commerce, and no certificate or permit shall be issued to such a carrier or remain in force

unless and until there shall have been filed with and accepted by the Commission surety bonds, certificates of insurance, proof of qualifications as self-insurer, or other securities or agreements, in the amounts prescribed in Sec. 387.303, conditioned to pay any final judgment recovered against such motor carrier for bodily injuries to or the death of any person resulting from the negligent operation, maintenance or use of motor vehicles in transportation subject to subchapter II, chapter 105, subtitle IV of title 49 of the U.S. Code, or for loss of or damage to property of others, or, in the case of motor carriers of property operating freight vehicles described in Sec. 387.303(b)(2) of this part, for environmental restoration.